Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

STUBBLEFIELD CONSTRUCTION COMPANY and STUBBLEFIELD PROPERTIES,

Petitioners,

v.

CITY OF SAN BERNARDINO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Fourth Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI

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92 pp

QUESTIONS PRESENTED

QUESTION 1:

AFTER A TEN WEEK TRIAL, A JURY FOUND THAT A CITY'S DELIBERATE ACTIONS TO DELAY AND ULTIMATELY DEFEAT A PROPOSED APARTMENT PROJECT WERE NOT SUBSTANTIALLY RELATED TO THE PUBLIC HEALTH, SAFETY, MORALS, OR GENERAL WELFARE. **DOES A CITY VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WHEN ITS ACTIONS TO DEFEAT A PROPOSED USE OF PROPERTY ARE PLAINLY ARBITRARY, IRRATIONAL, AND UNRELATED TO ANY LEGITIMATE GOVERNMENTAL INTEREST?**

QUESTION 2:

MUST A PROPERTY OWNER PROVE THE EXISTENCE OF A "VESTED RIGHT" OR OTHER SPECIFIC ENTITLEMENT UNDER STATE LAW IN ORDER TO RECEIVE THE PROTECTION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

LIST OF PARTIES and RULE 29.1 LIST

The Petitioners herein, Stubblefield Construction Company and Stubblefield Properties, were the plaintiffs in the trial court and the respondents and cross-appellants in the state appellate court proceedings. The City of San Bernardino, the Respondent herein, was a defendant in the trial court and appellant and respondent in the state appellate proceedings. Individually named defendants (Evlyn Wilcox, Esther Estrada, Jack Reilly, Jess Flores, Michael Maudsley, Tom Minor, Valerie Pope Ludlam, Norine Miller, and Steve Marks) were dismissed from the action by the trial court and were not parties to the appeals and are not parties herein.

Stubblefield Construction Company is a privately held California corporation and has no parent, subsidiary, or affiliate corporation. Stubblefield Construction Company is the general partner of Stubblefield Properties, a California General Partnership.

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On Petition For A Writ Of Certiorari To The Court Of Appeal Of California Fourth Appellate District, Division Two

PETITION FOR A WRIT OF CERTIORARI

Petitioners Stubblefield Construction Company and Stubblefield Properties respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of California, Fourth Appellate District, Division Two, filed on January 27, 1995, and the Order Denying Rehearing entered on February 23, 1995.

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, reported in *Stubblefield Constr. Co. v. City of San Bernardino*, 32 Cal. App. 4th 687, 38 Cal. Rptr. 2d 413 (1995), is reprinted in the Appendix at A-1.[1] The summary orders of the Court of Appeal denying rehearing, App. at A-39, and the California Supreme Court denying the Petitioners' Petition for Review, App. at A-41, are unreported.

JURISDICTION

The judgment of the California Court of Appeal, Fourth Appellate District, was entered on January 27, 1995. App. at A-1. The Court of Appeal denied a timely petition for rehearing on February 23, 1995. App. at A-39. On April 20, 1995, the California Supreme Court denied a petition for review, Justice Arabian stating that review should be granted. App. at A-41.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

[1] Hereinafter, "App." shall refer to the Appendix which follows the Petition. "RT___" shall refer to the Reporters' Transcript on Appeal filed in the California Court of Appeal, excerpts of which are reprinted in the Appendix at A-46. "JA ___" shall refer to pages of the Joint Appendix filed in the California Court of Appeal. "Exh." shall refer to exhibits introduced in evidence during the trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. XIV, § 1:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . "

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . "

STATEMENT OF THE CASE

This is a civil rights land use case brought in state court under 42 U.S.C. § 1983. It is significant, not only to the litigants, but to the burgeoning body of civil rights land use law in both the federal and state courts. As federal courts have restricted access through exhaustion and ripeness requirements, state courts have emerged as the "forum of choice" for plaintiffs suing local officials under Section 1983. S. Steinglass, *Section 1983 Litigation In State Courts* 1-1 (1988 & Supp. 1991). Litigation of federal constitutional claims in state court has virtually "exploded." *Id.* at 1-2. A significant number of the § 1983 cases filed in state courts involve land use issues. *Id.* at 2-50.

Petitioners Stubblefield Construction Company and Stubblefield Properties ("Stubblefield") proved to a state court jury during a 31-day trial that the deliberate, unprecedented obstruction of the approval of their 492-unit apartment project by City of San Bernardino ("City") officials violated their substantive due process rights under the Fourteenth Amendment to the U.S. Constitution. The jury's verdict was based on evidence that two City Council members spearheaded a campaign designed and orchestrated to scuttle its project by any means – fair or foul. The Court of Appeal acknowledged that the jury accepted the truth of this evidence, 32 Cal. App. 4th at 696, App. at A-5, but nonetheless decided that such underhanded activity could not – as a matter of law – have violated Stubblefield's rights.

After intentionally delaying the project's ministerial approval until a development moratorium was in place, the City Council, upon lifting the moratorium, downzoned the property from 638 residential units to 4. The jury returned a $11,537,000 verdict for Stubblefield, specifically finding by special interrogatory that the City's actions were not taken for a purpose substantially related to the public health, safety, morals, or general welfare, and were motivated with a purpose of intending to discriminate against Stubblefield. Judgment on Special Verdicts for Plaintiffs, App. at A-43 to A-44.[2]

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[2] Stubblefield argued that the jury should also have decided the issue of whether the City's actions were irrational and/or arbitrary. 32 Cal. App. 4th at 706 n. 10; App. at A-21 n. 10. Stubblefield's original proposed verdict form asked the jury to decide if the City's actions were arbitrary, irrational, or malicious. JA 783.

Raising The Federal Question

The eighth cause of action of Stubblefield's complaint alleged, among other things, that through a pattern of conduct deliberately engineered to block approval of its project, the City violated its rights to substantive due process and equal protection of the laws under the U. S. Constitution. JA 3, 34-36. A state court jury and judge agreed. JA 1036-39; App. at A-42 to A-45. Following entry of judgment, the trial court denied the City's motion for judgment notwithstanding the verdict, expressly finding that there was sufficient evidence to support the jury's verdict. JA 1293-94. Concurrently, the court granted a partial new trial limited solely to the issue of damages. JA 1294.

The Court of Appeal, throwing out the jury's verdict, held that the trial court should have granted the City's motion for JNOV. In the court's view, the case never should have gone to the jury since there was insufficient evidence, as a matter of law, to establish a substantive due process violation. 32 Cal. App. 4th at 710, 712, 715; App. at A-29, A-32, A-37.[3]

In its unsuccessful Petition for Review to the California Supreme Court, Stubblefield argued that the Court of Appeal had wrongly interpreted and applied the federal law relating to substantive due process under the Fourteenth Amendment. Throughout these proceedings, Stubblefield based its Section 1983 challenge on federal

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[3] The court also held that Stubblefield did not establish an equal protection violation. 32 Cal. App. 4th at 714; App. at A-36. Stubblefield does not challenge the court's equal protection determination in this Petition.

constitutional law, specifically the Due Process Clause of the Fourteenth Amendment. The federal question was thus raised at the earliest opportunity and pursued throughout the litigation.

Facts Material To The Questions Presented

Stubblefield's development application, filed under the City's "Review of Plans" process in May, 1986, complied with every City land use ordinance and regulation then in effect, seeking no deviations from the City's standard development criteria. RT 1294-95; App. at A-50 to A-51. Unrefuted testimony established that City regulations entitled Stubblefield to an imminent, ministerial approval; planning department staff could not deny Stubblefield's application: "It was a cut and dry review and approve." Testimony of former City Planning Director, Frank Schuma, RT 1185-86; App. at A-46 to A-47.[4] From the evidence, the jury concluded that Stubblefield's development did not proceed routinely through City Hall to the point where it would now be providing housing because of what the Court of Appeal itself called a "vendetta" orchestrated by City Councilman Steve Marks. 32 Cal. App. 4th at 711; App. at A-29. Although the Court of Appeal's discussion attempts to "spin" the facts in a manner that makes this "vendetta" sound like nothing

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[4] The Court of Appeal erroneously states that "some parts of the approval process, such as whether an EIR [environmental impact report] would be required, were discretionary." 32 Cal. App. 4th at 697 n.4; App. at A-7. Planning Director Schuma explained that no EIR was required under the Review of Plans process. RT 1280-81; App. at A-50 to A-51.

more than good old politics as usual, the facts – as the jury recognized – show something far more perverse.

The facts of this case resonate even more forcefully when read alongside those recited in the recent Third Circuit decision in *Blanche Rd. Corp. v. Bensalem Township*, 1995 U.S. App. LEXIS 12802 (3d Cir. 1995), *reh'g denied*, 1995 U.S. App. LEXIS 15990 (1995) (en banc). There, the court not only held that such politics as usual cannot be constitutionally tolerated, but the court personally rebuked the individual Township officials in denying them any sort of immunity:

> If defendants, for reasons unrelated to an appropriate governmental purpose, intentionally conspired to impede the development of the Blanche Road project by ordering that Blanche Road's applications be reviewed with greater scrutiny in order to slow down the development and by ordering that efforts be taken to shut down the development, such an arbitrary abuse of governmental power would clearly exceed the scope of qualified immunity.

Id. at *43.

The *Blanche Road* facts pale in comparison to what the jury found to have happened to Stubblefield. The evidence below is so clear and uncontradicted that, even in defending the City, the Court of Appeal had to concede that City officials, driven by Councilman Steve Marks, blocked approval of Stubblefield's project with a deliberate, unprecedented campaign. 32 Cal. App. 4th at 697-98; App. at A-7 to A-9.[5] It describes Marks' actions deliberately calculated to insure the project's demise:

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[5] The following discussion focuses on Marks because the evidence shows he was the prime mover behind the municipal

- Marks imposed a height limitation and conditional use permit requirement specifically "aimed at the Stubblefield project." *Id.* at 697; App. at A-7.[6]

- Marks ramroded an urgency measure through the City Council designed to defeat the project by wiping out the City's long-standing policy of processing a development application under the regulations in effect when the application was filed and imposing a 30-day time limit for final project approval. *Id.* at 698; App. at A-8 to A-9. The Court of Appeal concedes that there was absolutely "no justification" for the emergency measure "except the desire to block approval of the Stubblefield Project." *Id.* at 698; App. at A-8.

- Marks then fashioned a procedure which allowed him to appeal a favorable ruling on the project by the City's Environmental Review Committee so he could delay final project approval beyond the 30-day deadline he had devised. *Id.*; App. at A-9. This maneuver permitted Marks to "appeal" an issue to the City Council so that he, as a member of the Council, could sit in judgment on the validity of his own appeal.

- City officials thereafter stalled a request by Stubblefield to "grandfather" its project from early December,

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war on Stubblefield. Plainly, however, Marks could not have accomplished his goal without the active cooperation of his colleagues on the City Council, a majority of whom had to vote with him at every turn. Whatever the means, it was official City action that destroyed Stubblefield's project.

[6] Even after the City adopted its "new standards," Stubblefield met all requirements except the height limitation which Marks had inserted for the express purpose of scuttling the project. RT 2434-33, 2578.

1986, through March, 1987, until the City imposed a new development moratorium. *Id.* at 699; App. at A-10 to A-11.[7]

For the Court of Appeal, Marks' Machiavellian resort to "all means within his power" to defeat the project, *id.* at 711; App. at A-29 to A-30, exemplified the "democratic process at work." *Id.* at 714 n.19; App. at A-36. To make its conclusion more palatable, the court omits any reference to the *means* Marks employed. In the administrative arena, Marks threatened and intimidated Planning Director Schuma with termination if he did not accelerate general plan revisions designed to downzone the Stubblefield property and preclude project approval. RT 1264, 1358-59. And, in the legislative sphere, Marks bullied and intimidated a Council colleague, threatening him with denial of future projects in his Council district if he supported the Stubblefield project. RT 1452-55. But, for the court below, this "vendetta" represented an appropriate response to "concerns of constituents . . . and other political concerns." 32 Cal. App. 4th at 711; App. at A-29.

As noted by the appellate court, the actions to undermine the Stubblefield project did not end when Steve Marks vacated his council seat in January 1987. On January 19, 1988, after tabling Stubblefield's grandfathering

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[7] Stubblefield's "grandfathering" request sought a waiver of Marks' discriminatory height limitation so it could proceed under the rules in effect when its application was filed, consistent with long-standing City policy. RT 1252-53; App. at A-49 to A-50. Stubblefield's request was essentially a request for a variance, a permit which allows a landowner to deviate from certain development standards such as building height. RT 1903-04; 1908-09.

request for fifteen months without explanation, the City held a "hearing" on the grandfathering application. *Id.* at 699-700; App. at A-11 to A-12. The court fails to explain that this "hearing" happened only after Michael Maudsley, Marks' hand-picked successor, asked the new Planning Director how the City could "get rid of the project" and directed her to draft a motion to put it "to rest once and for all." RT 1813; Exh. 74. When the City "summarily denied" Stubblefield's request to address the Council, *id.* at 700; App. at A-12, it violated consistently observed City policy, RT 1764-65; Exh. 67, and ignored a public hearing notice which it had published in the local newspaper. When asked why the Council had refused Stubblefield the right to speak, the Mayor explained, "the Council had met [in closed session], they had all made up their mind that this project was going down to defeat, so why talk about it." RT 2614.

Finally, in June, 1989, when the City lifted the two-year moratorium, the Council downzoned the Stubblefield property from 638 units to 4. RT 2807, 3234-37. Overwhelming evidence established that the downzoning of the Stubblefield property occurred, not as an incidental, unforeseen consequence of the actions of City officials, but as the intended result of their meticulously executed plans.

REASONS FOR GRANTING THE PETITION

I.

FEDERAL CIRCUIT COURTS HAVE REPEATEDLY VOICED AN ACUTE NEED FOR GUIDANCE FROM THIS COURT IN REVIEWING CLAIMS OF PROPERTY OWNERS DEPRIVED OF SUBSTANTIVE DUE PROCESS

For some time now, federal circuit courts and law journals have been noting both the lack of uniformity and the dearth of Supreme Court guidance in an area of constitutional law which this Court has described as a "treacherous field." *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977). A typical observation appears in *Pearson v. City of Grand Blanc*:

> The circuits are in substantial disagreement on the role of the federal courts in reviewing zoning claims of this kind. Although the Supreme Court has held that federal review of local zoning on arbitrary and capricious substantive due process grounds is valid in appropriate cases, it has never laid down definitive standards of review . . . The lack of uniformity among the circuits, in dealing with zoning cases of the 'arbitrary and capricious substantive due process' category is remarkable."

961 F.2d 1211, 1217 (6th Cir. 1992).[8]

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[8] *See also RRI Realty Corp. v. Village of Southampton*, 870 F.2d 911, 914 (2d Cir. 1989) (federal courts have charted "uneven course" in explicating how substantive component of Due Process Clause protects landowners in disputes with local agencies); *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990) (law unsettled in Eighth and other circuits as to "parameters of substantive due process in zoning cases . . . . "); *Lemke v.*

Legal journals have echoed the courts' statements. *See, e.g.*, Comment, *Giving Property All The Process That's Due: A "Fundamental" Misunderstanding About Due Process*, 41 Cath. U.L. Rev. 703, 704 (1992) (Supreme Court opinions fail to provide "coherent guidelines" for analysis of substantive due process claims, causing lower courts to proceed with "little direct guidance" regarding whether and when arbitrary and capricious deprivations of property rights implicate substantive due process); *see also* Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process?*, 16 U. Dayton L. Rev. 313, 315 (1991) (survey of lower court decisions suggests Supreme Court has "failed to provide guidance" as to when substantive due process applies).

The circuit courts also lack consistent legal standards concerning the type of property interest which triggers substantive due process guarantees. *See Deblasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 598 (3d Cir. 1995) (issue of "whether and when state-created property interests invoke substantive due process concerns" undecided by Supreme Court); *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991).

This case affords the Court the opportunity to establish standards and restore needed uniformity in an area of the law "famous for its controversy, and not known for its simplicity." *Deblasio*, 53 F.3d at 598 (citing *Schaper v. City of Huntsville*, 813 F.2d 709, 716 (5th Cir. 1987)).

Cass County, 846 F.2d 469, 470-71 (8th Cir. 1987) (en banc) (whether substantive due process claim may arise from denial of zoning permit an open question in Eighth Circuit).

II.

A STARK AND IRRECONCILABLE CONFLICT EXISTS IN THE CIRCUIT COURTS ON THE ISSUE OF WHETHER ARBITRARY AND IRRATIONAL ACTIONS OF GOVERNMENT OFFICIALS WHICH HAVE NO SUBSTANTIAL RELATION TO A LEGITIMATE GOVERNMENTAL INTEREST VIOLATE A PROPERTY OWNER'S RIGHT TO SUBSTANTIVE DUE PROCESS

In November, 1991, this Court granted a petition for certiorari in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted*, 502 U.S. 956 (1991), *cert. dismissed*, 503 U.S. 257 (1992), limited to the question of whether an arbitrary, capricious or illegal denial of a construction permit to a developer can state a substantive due process claim under 42 U.S.C. § 1983. Following briefing and oral argument, the Court dismissed the writ as improvidently granted, leaving the question undecided.

The first question presented in this Petition is essentially the same question as that presented in *PFZ Properties* – but with a factual record fully developed at trial. The need to have this question decided has not dissipated since 1991; if anything, it has intensified. Conflicting decisions have proliferated in the circuit courts and two sharply distinguishable paths have been carved out to determine how and when a property owner has been deprived of its right to substantive due process of law.

The federal circuits have split into two principal camps: those which have followed the "rational relation" test first applied in a land use context in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), and those which have established their own *ad hoc* tests, unsupported by any authority from this Court. The first group

includes the overwhelming majority of circuits which consistently hold that deliberate, arbitrary, and irrational interference with a development approval violates an owner's substantive due process rights. The second group consists principally of the First Circuit which has consistently held that even bad faith actions of local officials purposefully and maliciously intended to obstruct a development approval do not violate a property owner's substantive due process rights. There are intracircuit conflicts in both the Seventh and the Eighth Circuits, with some panels applying the *Euclid* test and others fashioning additional, gratuitous requirements.

Moore v. City of East Cleveland characterizes *Euclid* as "this Court's leading land-use case." 431 U.S. at 498. *Euclid* held that governmental regulations restricting an owner's use of his land will be found unconstitutional under the substantive component of the Due Process Clause if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." Two years later, the Court reiterated the test in *Nectow v. City of Cambridge*:

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. . . . the action of the zoning authorities comes within the ban of the 14th Amendment and cannot be sustained.

277 U.S. 183, 187-88 (1928).

The Second, Third, Fourth, Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits have consistently applied the

Euclid and *Nectow* rational relation test in cases where landowners have alleged substantive due process violations based upon malicious, irrational, or plainly arbitrary actions of government officials.[9]

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[9] *See Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988) (land owner states claim where there exists "no rational basis" for revocation of permit); *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 692 (3d Cir. 1993) (citing *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991) (substantive due process proven if actions not rationally related to a legitimate government interest or motivated by bias, bad faith, or improper motive), *cert. denied*, 503 U.S. 984 (1992)); *Geo-Tech Reclamation Indus., Inc. v. Hamrick, III*, 886 F.2d 662, 666 (4th Cir. 1989) (question is whether challenged regulation is arbitrary and capricious, having no substantial relation to its purported goal); *Shelton v. City of College Station*, 780 F.2d 475, 477 (5th Cir.1986) (en banc) (in absence of invidious discrimination or infringement of fundamental interests, property owner's due process claim confined to whether the decisions were arbitrary and capricious, which test is met if there is rational basis for decision); *Pearson v. City of Grand Blanc*, 961 F.2d at 1221, 1223 (substantive due process violation exists where administrative action is arbitrary and capricious, meaning there is no rational basis for decision or is clearly arbitrary and unreasonable in that it has no substantial relation to public health, safety, morals, or general welfare); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) (citing *Sinaloa Lake Owners' Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989) (landowner must prove challenged actions are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare"), *cert. denied*, 494 U.S. 1016 (1990); *Jacobs, Visconsi & Jacobs Co. v. City of Lawrence*, 927 F.2d at 1119 (in absence of invidious discrimination, suspect class, or infringement of fundamental interest, review limited to determining whether decision was arbitrary and capricious); *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549 (11th Cir. 1994) (deprivation of property interest rises to level of substantive due process violation if done for improper motives

In sharp contrast, the leading First Circuit substantive due process cases, which the California Court of Appeal heavily relied on in this case, fail to even cite *Euclid*, much less apply it.[10] *PFZ Properties* relies primarily on *Creative Environments* and *Chiplin Enterprises; Chiplin Enterprises* relies primarily on *Creative Environments;* and *Creative Environments* appears to draw its substantive due process formulation out of thin air. Small wonder that the law in the First Circuit has strayed so far from the constitutional underpinnings established by this Court.

The First Circuit's aberrant position has not gone unnoticed by the other circuits. The Sixth Circuit has commented on the First Circuit's reluctance to recognize landowners' claims,[11] and the Eighth Circuit observes, "[t]he First Circuit has consistently held that a § 1983 claim may not be based on a denial of a permit, even if the denial was malicious, in bad faith, and for invalid and illegal reasons." *Littlefield v. City of Afton*, 785 F.2d 596, 604 (8th Cir. 1986).

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and achieved through means that are arbitrary and capricious, and lacking any rational basis).

[10] *See, e.g., Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *Chiplin Enters. v. City of Lebanon*, 712 F.2d 1524, 1526-28 (1st Cir. 1983); *Cloutier v. Town of Epping*, 714 F.2d 1184, 1189 (1st Cir. 1983); *PFZ Properties, Inc.*, 928 F.2d at 32.

[11] *Pearson v. City of Grand Blanc* explains that in the First Circuit substantive due process is not violated "even when accompanied by claims of purposeful, malicious obstruction of a landowner's rights." 961 F.2d at 1217. The First Circuit "precludes the trial court from inquiring into actual as opposed to the declared motives of the local legislative body . . . . " *Id.* (footnotes omitted).

Decisions of Seventh Circuit panels reveal a split within their ranks over what constitutes a substantive due process violation. Some panels have applied the "rational basis" test of *Euclid*.[12] Others have imposed an additional requirement, requiring plaintiffs to allege the violation of *another* constitutional interest or to establish the inadequacy of state remedies.[13]

The Eighth Circuit, too, is split. Although a case decided in 1987 applied the rational relation test,[14] subsequent cases have held that a property owner must allege and prove "something more" than that the governmental decision was arbitrary or capricious.[15]

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[12] *See, e.g., Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 577 (7th Cir. 1990) (citing *Burrell v. City of Kankakee*, 815 F.2d 1127, 1129 (7th Cir. 1987) (citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926))).

[13] *See, e.g., Polenz v. Parrott*, 883 F.2d 551, 558-59 (7th Cir. 1989); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990).

[14] *See Littlefield*, 785 F.2d at 607 (substantive due process claim stated where plaintiffs alleged City acted capriciously and arbitrarily by imposing unconstitutional condition on granting of permit).

[15] *See, e.g., Lemke v. Cass County*, 846 F.2d 469 at 472 (Arnold, J., concurring) (decision must be "truly irrational – for example, a zoning board's decision made by flipping a coin . . . . "); *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992) (substantive due process properly reserved "for truly egregious and extraordinary cases," the court stating that it would have rejected the substantive due process claim "even if the City had knowingly enforced the invalid zoning ordinance in bad faith . . . . ").

To state that the law in the circuits is in disarray is putting it mildly. It is time for some principled consistency to be introduced into what has become unwieldy chaos in order that landowners may know, with some degree of uncertainty, the nature and scope of their rights.

III.

LEADING DECISIONS IN THE STATE COURTS ARE AS SPLINTERED AS THOSE IN THE FEDERAL CIRCUITS ON THE ISSUE OF WHETHER ARBITRARY AND IRRATIONAL ACTIONS OF GOVERNMENT OFFICIALS VIOLATE A PROPERTY OWNER'S RIGHT TO SUBSTANTIVE DUE PROCESS

Not surprisingly, the decisions of the highest courts of several states reflect the same conflicting legal analysis on this question of federal law as the federal circuit courts have demonstrated. For example, the Washington Supreme Court applies the rational basis test, relying on cases from the Third, Ninth, and Eleventh Circuits (challenged government action must be "wholly arbitrary and capricious or irrational or utterly fail[ ] to serve a legitimate purpose"). *Robinson v. City of Seattle*, 119 Wash. 2d 34, 830 P.2d 318 (1992). In contrast, the Supreme Judicial Court of Massachusetts, expressly declining to determine which approach "is correct as a matter of law," has simply applied the law of the First Circuit where it is located, citing *Creative Environments, Chiplin Enterprises*, and *PFZ Properties. Freeman v. Planning Bd.*, 419 Mass. 548, 558, 646 N.E.2d 139 (1995).

And, to complete the cycle of diversity, the Minnesota Supreme Court has applied the law of the Eighth

Circuit where it is located, finding that the theory of substantive due process is reserved for "truly egregious and extraordinary cases," citing *Condor Corp. v. City of Saint Paul*, 912 F.2d at 220, and other Eighth Circuit cases. *Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 688, 1991 Minn. LEXIS 39 (1991).

Unlike these three state supreme courts, the California Court of Appeal in the present case chose to disregard both the law of the Ninth Circuit where it is located and the majority of federal circuits, selecting instead the law of the circuit which is the farthest removed geographically and in a legal minority of one – opposed, contradicted, and rejected by the majority of all the federal circuits. Without direction from this Court, courts of the fifty states will be free to pick and choose whatever law suits their fancy based on local parochial or political interests, thereby encouraging plaintiffs to engage in the most egregious type of forum shopping between federal and state courts.

IV.

THE CIRCUITS ARE ALSO IN SHARP CONFLICT ON THE ISSUE OF WHETHER OWNERSHIP IS A SIGNIFICANT PROPERTY INTEREST WORTHY OF SUBSTANTIVE DUE PROCESS PROTECTION

The Court of Appeal's decision in this case presents a subsidiary question which, like the first question of whether the Due Process Clause affords a remedy for arbitrary and capricious conduct, finds sharp division among the federal circuits. In addressing this second

issue, the courts have articulated two conceptually distinct approaches to deciding what type of property interest a landowner must possess in order to establish a substantive due process claim.

Four circuits have expressly held, or implicitly assumed, that property ownership alone entitles a person to constitutional protection under the Fourteenth Amendment. Most recently, the Third Circuit held that,

> ownership is a property interest worthy of substantive due process protection. Indeed, one would be hard-pressed to find a property interest more worthy of substantive due process protection than ownership. Thus, in the context of land use regulation, that is, in situations where the governmental decision in question impinges upon a landowner's use and enjoyment of property, a landowning plaintiff states a substantive due process claim where he or she alleges that the decision limiting the intended land use was arbitrarily or irrationally reached.

Deblasio, 53 F.3d at 600-01.

The Ninth Circuit assumes that a property owner has a sufficient property interest to assert a substantive due process challenge.[16] Similarly, the First Circuit does not appear to scrutinize the presence or absence of a property

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[16] Leading Ninth Circuit substantive due process decisions involving real property in California, which has one of the most stringent vested rights rules imaginable, do not involve a single owner who possessed a vested right. *See, e.g., Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990); *Sinaloa*, 882 F.2d 1398; *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1987), *amended, reh'g denied*, 857 F.2d 567 (1988) (en banc), *cert. denied*, 489 U.S. 1090 (1989).

owner's "protected interest."[17] And, the Eighth Circuit appears only to require a property interest beyond property ownership when the claim is based on *procedural*, as opposed to substantive, due process. *See, e.g., Littlefield*, 785 F.2d at 600.

In striking contrast, four circuits have embarked on a peculiar path to deny property owners the right to challenge arbitrary and irrational government actions. They have devised an additional requirement based upon *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972), employment cases where the Court found no traditional property interest to exist.[18] Both *Roth* and *Perry* involved intangible rights – the right of nontenured faculty members to continued employment – not a right grounded in ownership of real property. The issue was whether a statute or other form of government action created a protected property interest where one did not otherwise exist. It would appear that the Court intended to expand the concept of property, not contract it as later courts have done. Significantly, since *Roth* and *Perry*, this Court has continued to accept mere property

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[17] This is largely immaterial, however, since the First Circuit refuses to recognize such claims in any event.

[18] Noting that this Court has never required such a threshold inquiry, the court in *RRI Realty Corp.* comments, "[i]t is not readily apparent why land regulation cases that involve applications to local regulators have applied the *Roth* entitlement test to inquire whether an entitlement exists in what has been applied for . . . instead of simply recognizing the owner's indisputable property interest in the land he owns and asking whether local government has exceeded the limits of substantive due process in regulating the plaintiff's use of his property by denying the application arbitrarily and capriciously. 870 F.2d at 918.

ownership as a sufficient interest on which to base substantive due process claims.

The Second, Fourth, Sixth and Eleventh Circuits have, in varying degrees, applied the *Roth* "entitlement analysis" to substantive due process cases, requiring a property owner to first establish an "entitlement" to a permit under state law before he may assert a substantive due process claim under the Fourteenth Amendment.[19] The courts applying the "entitlement analysis" generally look to the amount of discretion vested in the permitting authority, finding that where discretion exists to deny a permit, a sufficient property interest does not exist.[20]

The Seventh Circuit is divided on this issue. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 156-66 (7th Cir. 1994) (fee simple ownership is property interest giving rise to substantive due process protection). *But see New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990) (before party may assert substantive due process argument, it must establish "legitimate claim of entitlement" to the right asserted). The same conflict exists within the Tenth Circuit. Some panels require a plaintiff to allege a liberty or property interest to which due process guarantees attach; others

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[19] *See, e.g., RRI Realty Corp.*, 870 F.2d at 915-18; *Scott v. Greenville County*, 716 F.2d 1409, 1418-22 (4th Cir. 1983); *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 202 (6th Cir. 1995).

[20] *See RRI Realty Corp.*, 870 F.2d at 918 (entitlement analysis focuses on "degree of official discretion. . . . "); *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992) (legitimate claim of entitlement turns on whether "local agency lacks *all* discretion to deny" permit); *Triomphe Investors, Inc.*, 49 F.3d 198 at 202 (to establish property interest, landowner must prove zoning board did not have discretion to deny land use sought).

view substantive due process rights as founded upon "deeply rooted notions of fundamental personal interests derived from the Constitution." *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d at 1119. Neither the Fifth Circuit nor the D.C. Circuit appears to have addressed the issue.

Neither this Court nor any federal circuit court has taken the extreme position adopted by the California appellate court in this case that constitutional protection is conditioned upon proving a "vested right" under state law.[21] This Court has never required an owner of *real property* to establish an "entitlement" to a constitutionally

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[21] The court below framed the issue as "whether plaintiffs had a property right protected by the due process clause, *i.e., whether plaintiffs had a vested right to develop their property.*" 32 Cal. App. 4th at 706; App. at A-22 (emphasis added). Looking to *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal.3d 785 (1976), the court concluded that Stubblefield had no vested right to build because it had not applied for or received a building permit for its project. *Id.* at 708; App. at A-25. Engrafting a "vested rights" concept on this constitutional claim is contrary to this Court's consistent jurisprudence which nowhere mentions such an idea. Presumably, had this Court intended to say the possession of "vested rights" was a necessary predicate to constitutional litigation, it could have done so. The Ninth Circuit recently contrasted the two doctrines:

> "In contrast to a taking or deprivation claim, the gravamen of a 'vested rights' claim is that the landowner has a right to a particular use of his land because he has relied to his detriment on a formal government promise (in the form of a permit) stating that he can develop that use. The claim is thus a species of governmental estoppel. A claim of estoppel against the government rests not on Constitutional norms of fairness but on broader norms of equity."

Lakeview Dev. Corp. v. City of S. Lake Tahoe, 915 F.2d 1290, 1295 (9th Cir. 1990) (citation omitted).

protected property interest in order to state a claim for substantive due process. In the early substantive due process cases of *Euclid*, *Nectow*, and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) this Court *assumed* that a property owner had a sufficient interest to challenge interference with the legitimate use of his property. In *Roberge*, the Court writes: "[t]he right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution. 278 U.S. at 121.

This Court has consistently upheld the constitutional principle enunciated in these early substantive due process cases – that a property owner has a constitutional right to put his property to legitimate use without arbitrary or irrational governmental interference. Not surprisingly, the Court's more recent decisions on property owners' claims of governmental suppression of property rights all look to *Euclid* and affirm its clear holding and underlying rationale.[22] Each of these cases reiterates the fundamental principle that property owners have a *right* to be free of arbitrary or irrational governmental actions which interfere with their right to develop property within legitimate limits established under law.[23]

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[22] *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 2 (1974); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 676 (1976). *See also id.* at 681, 683 (Stevens, J., dissenting) (owner of real property has *right* to develop his land to his economic advantage, and applying for a zoning amendment is aspect of property ownership protected by Due Process clause of Fourteenth Amendment); *Village of Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 263 (1977).

[23] This same notion is articulated in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987), where this Court

Petitioners urge the Court to restore in all of the circuits a concept of property rights following this Court's consistent pronouncements.

V.

THE CALIFORNIA COURT'S ERRONEOUS DECISION IN THIS CASE STRAYS EVEN BEYOND THE ERRANT STANDARD ESTABLISHED IN THE FIRST CIRCUIT TRILOGY OF CASES ON WHICH IT RELIES AND LAYS THE GROUNDWORK FOR FURTHER EROSION OF PROPERTY OWNERS' RIGHTS IN ALL FIFTY STATES

The California Court of Appeal apparently bought into the idea that as long as elected officials are doing what a majority of their constituents want them to do, their actions are insulated from all judicial scrutiny. Its cavalier endorsement of City officials' calculated, obstructive tactics, without any analysis of whether the actions advanced any *legitimate* governmental purpose or whether the motives and tactics employed by the City

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stated that the "right to build on one's own property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit.' " The same point was reiterated in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2894 n.7 (1992), where this Court noted that constitutional protection was required because Mr. Lucas held a fee simple interest in the property, "an estate with a rich tradition of protection at common law . . . . " And even though the constitutional challenges in *Nollan* and *Lucas* rested upon the "Takings Clause" of the Fifth Amendment, there is no principled basis for distinguishing a property owner's constitutionally protected interest under the Takings Clause of the Fifth Amendment and the substantive component of the Due Process Clause of the Fourteenth Amendment.

were legally permissible, signals a startling departure from settled substantive due process law.

A substantive due process challenge to official action must satisfy a two-part test: does the action serve a legitimate *purpose* and are the *means* employed rationally related to the legitimate purpose? *Moore*, 431 U.S. at 498 n.6. Under any of the common formulations, a court's inquiry must focus first upon the *objective or purpose* to be achieved and then upon the relationship between the action taken (the "means") and the stated purpose (the "end"). Moreover, "[t]he guaranty of due process, as has often been held, demands . . . that the means selected shall have a *real and substantial* relation to the objective sought to be attained." *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 84-85 (1980) (emphasis added).

The federal circuit courts have uniformly found substantive due process violations where actions of local officials are specifically directed at blocking a development project approval.

Thus, the Third Circuit recently upheld the claim of a property owner who, like Stubblefield, had alleged – and proved to a jury – that local officials had conspired to delay and ultimately shut down its development project:

> [P]laintiffs are asserting that defendants, acting in their capacity as officers of the Township, deliberately and improperly interfered with the process by which the Township issued permits, in order to block or to delay the issuance of plaintiffs' permits, and that defendants did so for reasons unrelated to the merits of the application for the permits. *Such actions, if proven, are sufficient to establish a substantive due process violation* . . . .

Blanche Rd. Corp. v. Bensalem Township, 1995 U.S. App. LEXIS 12802 at *38-39 (emphasis added). The California Court of Appeal stands alone in finding that an intentional goal of blocking a development project that otherwise meets all the requirements for approval in order to mollify political pressures is a *legitimate* governmental goal.[24] The court below entirely circumvented this Court's mandated two-step analysis, refusing to give consideration to the *objective* or *purpose* which Steve Marks and other City officials sought to achieve and failing to even question whether the chosen means were substantially related to a legitimate purpose. The court concedes that the actions of Marks and Maudsley "were taken with the Stubblefield project in mind, and *were taken for the purpose of blocking the project*. . . ." 32 Cal. App. 4th at 714.

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[24] *See, also, Brady v. Town of Colchester*, 863 F.2d at 216 (substantive due process rights violated by city's "substantial departure from normal practices"); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988), *cert. denied*, 488 U.S. 851 *and* 488 U.S. 868 (1988) (substantive due process claim stated where officials improperly interfered with permit issuing process); *Scott v. Greenville County*, 716 F.2d at 1420 (due process rights violated where moratorium and downzoning were "directed solely" at the property owner); *Marks v. City of Chesapeake*, 883 F.2d 308 (4th Cir. 1989) (substantive due process claim stated where property owner denied conditional use permit as a result of neighborhood pressure); *Littlefield v. City of Afton*, 785 F.2d at 607 (substantive due process claim stated when city arbitrarily imposed dedication condition on issuance of permit); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957-58 (9th Cir. 1991) (substantive due process claim stated where officials obstructed application for a rent increase); and *Executive 100, Inc. v. Martin County*, 922 F.2d 1536 (11th Cir. 1991) (substantive due process claim stated where actions undertaken for improper motive).

App. at A-35 (emphasis added). To the court below, however, Marks' undisguised "vendetta" against the project and his resort to "all means within his . . . power" to defeat it, *Id.* at 711; App. at A-29 to A-30, did not constitute arbitrary or irrational treatment. As acknowledged by the court, the jury disagreed: "Under plaintiffs' theory of the case, which was apparently accepted by the jury, the City officials arbitrarily acted to prevent plaintiff from developing its property." *Id.* at 696; App. at A-5.[25]

The court might have kept on track if it had examined the motives behind the official actions rather than viewing them as irrelevant. Federal circuit courts have consistently stepped in to examine the motives behind the official conduct when local officials act with the express motive or purpose of depriving a property owner of a project approval to which it is otherwise legitimately entitled.[26]

The court below went astray in blindly following the First Circuit in three particulars: it refused to examine the legitimacy of the City's goals; it refused to consider City officials' motives and means; and it insisted on equating a

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[25] To be sure, the court did not "read the record in the light most advantageous to the plaintiff, resolve all conflict in his favor [or] give him the benefit of all reasonable inferences in support of the original verdict" as required by California law. 32 Cal.App. 4th at 703; App. at A-17.

[26] *See Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570, 1577 (11th Cir. 1989) (citing *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989)); *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990); *Sinaloa*, 882 F.2d at 1407-08; *Blanche Rd. Corp. v. Bensalem Township*, 1995 U.S. App. LEXIS 12802 at *38-39.

vested right under state law with a constitutionally protected property interest. But even in the First Circuit cases which have rejected substantive due process claims, the plaintiffs did not allege, much less prove, a blatant, concerted campaign directly aimed at obstructing a development project as Stubblefield established in this case.

And, even if an entitlement analysis were applicable here, which it plainly is not, Stubblefield's property interest would be sufficient to establish its due process claim, for under the applicable City procedures, a project had to be approved if, as here, it met all the stated requirements. RT 1185-86; App. at A-47 to A-49. While the vested rights doctrine estops the government from altering the rules after a permit has been issued and relied upon, the Due Process Clause protects property owners from malicious and arbitrary governmental action even when owners do not have the protection of a vested right. Any rule that followed the Court of Appeal's formulation would leave property owners without a remedy – a result patently offensive to historical concepts of due process.

CONCLUSION

It is painfully apparent that the conflicts in and among the federal circuit courts and the highest courts of several states on the two questions presented in this Petition will not be resolved by future cases. The recurring nature of the issues presented here reflect a demonstrable need for uniform rules for all property owners and all courts – both federal and state. The issues are not only alive but promise to continue to confuse and confound the courts. Property owners in some states and some circuits are subject to liabilities or entitlements that property owners in other geographic areas of the country are not burdened with or entitled to. The Petition for Certiorari should be granted so this situation may be rectified and all property owners accorded their right of substantive due process under the Fourteenth Amendment.

Respectfully submitted,

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APPENDIX

Opinion of the Court of Appeal, Fourth District, Division Two, State of California, Reported at 32 Cal.App. 4th 687, filed January 27, 1995 ..... A-1

Order Modifying Opinion And Denying Petition For Rehearing And Certifying Opinion For Publication, filed February 23, 1995..... A-39

Order of the California Supreme Court Denying Petition For Review, dated April 20, 1995..... A-41

Judgment On Special Verdicts For Plaintiffs, entered April 10, 1991..... A-42

Excerpts from Reporters' Transcript On Appeal – Testimony of Frank Arnold Schuma..... A-46

APPENDIX

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

STUBBLEFIELD CONSTRUCTION CO., et al., Plaintiffs and Appellants, v. CITY OF SAN BERNARDINO, Defendant and Respondent. [AND RELATED CROSS-APPEALS]	)	E009749 (consol. with E010088) (Super.Ct.Nos. 242998 and 252058) **OPINION** (Filed Jan. 27, 1995)

APPEAL from the Superior Court of San Bernardino County. Don A. Turner, Judge. Reversed.

Hill, Farrer & Burrill, Darlene Fischer Phillips and Dean E. Dennis for Plaintiffs and Appellants Stubblefield Construction Company and Stubblefield Properties.

MacLachlan, Burford & Arias, Christopher D. Lockwood and Joseph Arias, James F. Penman, City Attorney, and Henry Empeño, Jr., Deputy City Attorney, for Defendant and Respondent City of San Bernardino.

This is an action for violation of plaintiffs' civil rights under 42 U.S.C.A. section 1983. The action arose out of defendant City's handling of plaintiffs' application to build apartment buildings on a 29.3-acre parcel in the

northeastern foothills of the City. Plaintiffs contend that the City violated their substantive due process and equal protection rights by allegedly deliberately inflicting harm "when [City officials] irrationally and arbitrarily manipulated City processes and procedures, for no legitimate reason, so as to prevent Stubblefield from building a development Project it was unquestionably entitled to build."

PROCEDURAL HISTORY

On April 18, 1988, plaintiffs Stubblefield Construction Company and Stubblefield Properties (herein "plaintiffs" or "Stubblefield") filed a petition for writ of mandate and complaint for declaratory relief, preliminary and permanent injunctions and damages against the City of San Bernardino, the members of its Common Council, the mayor, and Steve Marks, a former councilman (case no. 242998; herein "*Stubblefield I*"). Eleven causes of action were alleged, including an eighth cause of action for deprivation of civil rights under 42 U.S.C.A. section 1983.

On November 4, 1988, the City filed an amended cross-complaint for apportionment of fault and indemnification.

On September 29, 1989, plaintiffs filed an action challenging the validity of the City's revised General Plan (case no. 252058; herein "*Stubblefield II*"). The action was based on events occurring after events in *Stubblefield I*. Plaintiffs then filed a motion to consolidate *Stubblefield I* and *Stubblefield II*. The motion was granted and the cases were consolidated for trial.

At the commencement of trial, the court initially ordered a jury trial on the eighth cause of action in *Stubblefield I* (alleged violation of civil rights under 42 U.S.C.A. § 1983) and the seventh cause of action in *Stubblefield II* (insofar as it related to damages sustained under 42 U.S.C.A. § 1983). All other causes of action in both cases were to be tried to the court sitting without a jury after the jury trial.

The case was submitted to the jury for a special verdict on six questions. The first three questions related to plaintiffs' claim that the City violated plaintiffs' substantive due process rights. The remaining three questions related to the issue of whether the City violated plaintiffs' equal protection rights in connection with plaintiffs' proposed apartment project.

The jury found that defendant City of San Bernardino's actions with regard to Stubblefield's proposed apartment project were (1) not taken for a purpose substantially related to the public health, safety, morals, or general welfare[1] and (2) were motivated with a purpose

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[1] This is a test apparently deprived from the leading zoning case of *Euclid v. Ambler Co.* (1926) 272 U.S. 365. In that case, the Supreme Court held that, before a zoning ordinance could be held unconstitutional, the court must find that the "provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (*Id.*, at p. 395; see, also, *Moore v. East Cleveland* (1977) 431 U.S. 494, 498, fn. 6; *Sinaloa Lake Owners Ass'n v. City of Simi Valley* (9th Cir. 1989) 882 F.2d 1398, 1407-1409; *Greenbriar, Ltd. v. City of Alabaster* (11th Cir. 1989) 881 F.2d 1570, 1577.) The question of whether the actions here were arbitrary or unreasonable was not put to the jury.

of intending to discriminate against Stubblefield. It further found that the City's actions caused plaintiffs damages in excess of 11.5 million dollars.

Judgment on the jury's special verdict was entered on April 10, 1991, and plaintiffs dismissed the remaining causes of action in *Stubblefield I* with prejudice.

The trial court subsequently granted the City's motion for new trial on the issue of the amount of damages. It denied the City's motion for a new trial on the liability issues.

APPEALS

1. The City's Appeals.

Following the jury's verdict, the City filed a motion for judgment notwithstanding the verdict. The trial court denied the motion and the City appeals. The City also filed a cross-appeal from the judgment.

The trial court also made an interim award of attorney fees to plaintiffs. The City appeals that order.

2. Plaintiffs' Appeals.

The City also filed a motion for new trial. As noted above, the trial court granted the motion on the issue of damages only. Plaintiffs appeal the granting of the motion for new trial on the damages issue.

Plaintiffs also requested review of rulings of the trial court (1) denying their motion to file a supplemental pleading; and (2) granting defendant's motion for a nonsuit as to defendant Steve Marks, a former councilman.

Plaintiffs filed a notice of cross-appeal from the judgment, including the order granting defendant's motion for a nonsuit as to defendant Steve Marks.

3. Rulings of this Court.

In response to a motion filed by the City on September 20, 1991, this court dismissed plaintiffs' cross-appeal from the judgment by an order filed October 21, 1991, and a partial remittitur was issued on December 24, 1991. Ruling was reserved on other orders made on March 5, 1991. This court said: "The effect of the dismissal of [Stubblefield's] purported cross-appeal is to bar any appeal of the order of dismissal of Steve Marks, who is, therefore, not a party to this appeal. Any review of the order of March 5, 1991, is limited to its effect, if any, on the granting of the motion for new trial Stubblefield appealed by its notice filed July 9, 1991."

FACTS

Under plaintiffs' theory of the case, which was apparently accepted by the jury, the City officials arbitrarily acted to prevent plaintiff from developing its property. Plaintiffs alleged a number of actions which the City officials took to allegedly further this plan. Viewing the evidence in the light most favorable to plaintiffs, the factual basis for plaintiffs' claim is summarized in this section.[2]

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[2] Plaintiffs called as witnesses the members of the City Council at the time various actions were taken, two former mayors, two heads of the Planning Department, and various

Arnold Stubblefield testified that his company purchased approximately 600 acres of land in the foothills northeast of the City of San Bernardino in the early 1960's. He commenced planning a community to be known as Mountain Shadows. Homes were built in the area from 1964 through 1968.

In 1968, Mr. Stubblefield consented to the annexation of the property by the City. Mr. Stubblefield and a former mayor testified that Mr. Stubblefield was promised the zoning necessary to implement the master plan if he consented to the annexation. The City knew that Stubblefield would rely on its assurances and the City intended that it do so.[3] The subject parcel was zoned R-3 for multi-family housing pursuant to the master plan for the property.

In 1983, planning began for an apartment project in the foothills. After numerous meetings with City staff, an application for review of plans was submitted to the City on May 30, 1986. The application was considered a development application. A former planning director testified that the City's policy was to review development applications under the procedures in effect at the time the plans were submitted. This policy was stated to Stubblefield a number of times. Development applications were reviewed by the Planning Department, including review

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other City officials. The trial lasted 10 weeks and produced a transcript approaching 5,000 pages.

[3] Of course, one mayor or city council cannot limit the exercise of the police power by future mayors or city councils. (*Delucchi v. County of Santa Cruz* (1986) 179 Cal.App.3d 814, 823.)

by an Environmental Review Committee and the Development Review Committee. Final approval is by the Planning Commission and/or City Council.[4]

The city council member representing the area at the time was Steve Marks. Although originally a supporter of the project, he subsequently became a powerful opponent. Plaintiffs alleged that Councilman Marks orchestrated a number of actions in the Fall of 1986 to block the project. The City contended that Councilman Marks was merely reflecting the concerns of his constituents, many of whom testified against the project.

A revision of the City's R-3 multi-family housing zoning ordinance was pending at that time. The revised multi-family housing zoning ordinance was adopted on October 22, 1986. It potentially affected Stubblefield's project in two respects. First, it limited the height of apartments to two stories on the perimeter of the project. Second, it required a conditional use permit for any project which did not comply with the new ordinance. If the new ordinance were applied to the Stubblefield project, which contemplated three-story units, the project would require a conditional use permit. There was testimony that these requirements were aimed at the Stubblefield

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[4] The former planning director testified that the planning department approval process was ministerial rather than discretionary. He also testified that Stubblefield met all the requirements of the review of plans process. From this testimony, plaintiffs argue that they had a right to have their application approved. However, the witness conceded that some parts of the approval process, such as whether an EIR would be required, were discretionary.

project. However, Mr. Stubblefield was assured that the new ordinance would not apply to his project.

Since revision of the zoning ordinance would not affect the Stubblefield project under the City's existing approval policy (i.e., that development plans were reviewed under the rules in effect at the time of application, rather than the time of approval), Councilman Marks proposed an urgency ordinance to change the policy. The urgency ordinance was adopted on October 20, 1986. It provided that the revised R-3 ordinance would apply to "all projects for which plans have not been approved by the Development Review Committee as of thirty days following date of adoption of this section."[5] No justification for an urgency ordinance existed, except the desire to block approval of the Stubblefield project.

Stubblefield could still have received approval within the 30-day period. At that time, it had received approval from the Environmental Review Committee for using a negative declaration under the California Environmental Quality Act ("CEQA") on the project. However, Councilman Marks had previously sponsored an ordinance that allowed any person, not just the applicant, to appeal such

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[5] Former Councilman Strickler testified that the former policy was that a developer had a year from the filing of his application to meet the requirements of the zoning ordinance. The urgency ordinance reduced that period to 30 days. He thought the ordinance would have no effect on the Stubblefield project because he thought that project was grandfathered. He also thought the new guidelines would benefit developers.

a decision to the Planning Commission.[6] The ordinance passed on September 10, 1986, and Councilman Marks subsequently appealed the Environmental Review Committee's negative declaration decision to the Planning Commission. By this action, he delayed Design Review Committee approval of the Stubblefield project. The project was not approved within the requisite 30-day period.

On October 20, 1986, Councilman Marks engineered another amendment to the review of plans ordinance. Under the amendment, the proposed buildings had to be compatible with the surrounding neighborhood. This amendment was also aimed at the Stubblefield project.

The Planning Commission agreed with the Environmental Review Committee that a negative declaration was appropriate. Objecting homeowners in the neighborhood appealed that decision to the City Council. On November 17, 1986, a City Council meeting was held at Sturgess Auditorium to consider the appeal. A lengthy public hearing heard presentations by the homeowners, their attorney, and various experts about the potential environmental effects of the project. At the conclusion of the hearing, the City Council voted, 4-3, to require a focused environmental impact report for the project. A number of persons present at that meeting testified at trial concerning events of the meeting. The effect of the requirement for a focused EIR was to prevent Stubblefield's review of plans application from being

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[6] Former Councilman Strickler testified that he thought the ordinance was redundant because he understood that any councilman could bring a matter that was before a committee to the full council at any time without filing a formal appeal.

approved before the new multi-family zoning ordinance took effect.

Stubblefield accepted the City Council's decision and intended to prepare an environmental impact report. The City notified Stubblefield that it would require an environmental impact report and resubmission for a conditional use permit. Since a conditional use permit is discretionary and could be denied by the City Council, Stubblefield was not willing to risk denial after paying for an environmental impact report. Stubblefield also thought a report was not feasible until the City determined whether it would allow three-story apartment buildings on the project. Accordingly, no environmental impact report was ever prepared, and no conditional use permit application was submitted.[7]

Instead, Stubblefield requested the City Council to grandfather its project so that it could proceed under the requirements of the prior ordinance. The City Council referred the question to the Legislative Review Committee. The Legislative Review Committee delayed action on the request until early 1987. The Committee asked the City Attorney and the Planning Director to review and analyze the City's position for the Committee.

Five new council members were elected in March 1987. The Planning Director and City Attorney left and

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[7] Mr. Stubblefield testified that he was faced with three choices at the time: (1) to redesign the project to comply with the new ordinance; (2) to prepare the EIR, submit the conditional use permit application, and hope for discretionary approval of the project; or (3) to pursue the grandfathering application. He elected the latter option.

their positions were vacant for several months. No action was taken on Stubblefield's grandfathering request, and the opinions of the City Attorney and Planning Director were not forthcoming.

In March 1987, an unrelated lawsuit was filed challenging the adequacy of the City's general plan. As a result of that lawsuit, a moratorium on development was imposed by the court. The City Council passed an ordinance to implement the moratorium. The moratorium was under the supervision of the California Office of Planning and Research ("OPR"). The former director of OPR testified as to the meaning and effect of the moratorium. Plaintiffs alleged that the City applied the moratorium to include the Stubblefield property, and used the moratorium as an excuse not to take any further action on Stubblefield's grandfathering request, or on the project itself. The City took no action on Stubblefield's request to obtain clarification of the moratorium provisions from OPR. The moratorium was in effect for two years.

A staff report prepared by the new planning director on September 8, 1987, for the City Council reviewed the grandfathering request in some detail and recommended denial of the request. The Council subsequently referred the matter to the Legislative Review Committee for a second time.

Stubblefield was not told that action on its grandfathering request was tabled, but was notified by the new planning director that its development application could not be processed further until a new general plan was adopted.

On January 19, 1988, the City Council held a hearing on Stubblefield's application to grandfather its project. Despite an invitation to present argument in support of its application at that hearing, Stubblefield's request to speak was summarily denied on grounds that the hearing was not a public hearing. The Council then voted to deny approval of grandfathering.

The *Stubblefield I* complaint was filed on April 18, 1988. On June 2, 1989, a new general plan was adopted. Plaintiffs contend that it effectively prevented all development of the subject property. Damages were awarded on this basis.

ISSUES

1. Issues Raised by the City.

The City's primary contention is that its motion for judgment notwithstanding the verdict should have been granted because there was insufficient evidence to support a judgment for plaintiffs on either an equal protection or substantive due process theory.

In its cross-appeal, the City contends that a new trial should have been granted on all issues because of errors in the jury instructions and special verdict form, for juror misconduct, and for errors in the admission and exclusion of evidence.

The City also challenges the interim award of attorney fees to plaintiffs on grounds that plaintiffs have not achieved any success on the merits due to the granting of the new trial motion on the issue of damages.

2. Issues Raised by Plaintiffs.

Plaintiffs challenge the trial court's order granting a new trial on the issue of damages and seek to preserve the jury's finding of over 11.5 million dollars in damages.

3. Issue Raised by this Court.

In a letter dated September 16, 1994, this court requested the parties to comment on the applicability of *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725 and the one final judgment rule to this case. The parties submitted letter briefs on that subject, and we consider that issue first.

APPEALABILITY

In *Morehart v. County of Santa Barbara, supra,* 7 Cal.4th 725, our Supreme Court considered and rejected the holding of *Schonfeld v. City of Vallejo* (1975) 50 Cal.App.3d 401 that a final judgment resulted when a cause of action was properly severed, even though other causes of action remained to be tried. (*Id.*, at pp. 418-419.)

Morehart held that "an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining." (*Morehart v. County of Santa Barbara, supra,* 7 Cal.4th 725, 743.)

In applying *Morehart* here, we must first determine whether all of the causes of action between the parties include all causes of action alleged in *Stubblefield I* and

Stubblefield II. In other words, we must consider the effect of the order consolidating *Stubblefield I* and *Stubblefield II* for trial.

1. Effect of Consolidation Order.

Code of Civil Procedure, section 1048, subdivision (a), provides: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Consolidation may be for all purposes, or for purpose of trial only: "Ordinarily, consolidated actions may be determined by a single set of findings and a single judgment – 'the allegations of the various complaints may be taken together and treated as one pleading' [citation] and 'for the purposes of all further proceedings, the cases are to be treated as if the causes had been united originally' [citation]. But a different situation exists where pending actions are consolidated only for the purpose of trial of related issues. In such event the evidence presented in one case is to be deemed applicable in the other insofar as it is relevant thereto, but separate findings and judgments must be made in each case in disposition of the particular issues as independently submitted." (*McClure v. Donovan* (1949) 33 Cal.2d 717, 721-722.)

Here, plaintiffs' consolidation motion requested that the two cases be consolidated for trial. The motion was granted and the consolidation order specified that the

consolidation was for trial only. Separate findings and judgments were therefore required in each case.

2. Effect of Separate Trial of Civil Rights Cause of Action.

Stubblefield I alleged eleven causes of action. The eighth, deprivation of civil rights under 42 U.S.C.A. section 1983, was tried to the jury. Of the remaining causes of action, six were dismissed before trial and four were dismissed after trial. In addition, the City filed a cross-complaint in *Stubblefield I*. The record does not reflect the disposition of the cross-complaint.[8]

Stubblefield II alleged eight causes of action. The seventh cause of action alleged that the City's General Plan, adopted after the events in *Stubblefield I*, imposed a Hillside Management Overlay District that affected the value of all of plaintiffs' property in that District, including the apartment house site at issue in *Stubblefield I*. Plaintiffs seek 44 million dollars in damages in *Stubblefield II*.

Originally, the seventh cause of action was ordered tried with the eighth cause of action in *Stubblefield I*

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[8] Normally, the existence of an unresolved cross-complaint will defeat appealability under the one final judgment rule because it leaves unresolved issues between the parties. (1 Eisenberg, Cal. Practice Guide, Civil Appeals & Writs (1994) § 2:70, pp. 2-33 to 2-34.) However, it appears that the cross-complaint here was tried with the cause of action submitted to the jury, was necessarily abandoned or decided adversely to the City, and was inadvertently omitted from the judgment. In these circumstances, the technical presence of a cross-complaint does not violate the one final judgment rule. (*Ibid.*)

"insofar as [the seventh cause of action] relates to the damages suffered by plaintiff for any violation of the due process or of the civil rights under 1983. . . . " Subsequently, the trial court denied a motion to reconsider this ruling and said: "[T]he plaintiff will not be permitted to offer any evidence whatsoever on any of the causes of action of *Stubblefield II* to the jury. [¶] The plaintiff will be permitted to indicate to the jury the ultimate effect of the delay and the adoption of the General Plan, but will not be permitted to attack in any degree by innuendo or any other way the propriety of the General Plan or the H.M.O.D." By stipulation and court order, the remaining causes of action in *Stubblefield II* were to be tried by the court upon conclusion of the jury trial.

From the foregoing, we conclude that (1) the judgment in *Stubblefield I* is a final judgment, and that the appeals related to that judgment do not violate *Morehart* or the one final judgment rule; and (2) no part of *Stubblefield II* has been tried, and the issues in that case are not before us in this appeal.[9]

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[9] In their letter briefs, the parties agree that *Morehart* is inapplicable and that this appeal of *Stubblefield I* should be decided on its merits.

The parties also agree that no part of *Stubblefield II* has been tried. The City contends that the trial court allowed plaintiffs to try their damages claims from *Stubblefield II* during *Stubblefield I* without first establishing liability and that the trial court subsequently realized its error when it granted a new trial on damages. Nevertheless, the City agrees that *Stubblefield II* has not been tried.

Since plaintiffs' damages claim in *Stubblefield II* is based on the theory that its property was rendered valueless by the adoption of the Hillside Management Overlay District, interesting

I. CITY'S APPEAL OF JUDGMENT NOTWITHSTANDING THE VERDICT STANDARD OF REVIEW – JNOV

The City's appeal from the trial court's denial of the City's motion for judgment notwithstanding the verdict is a challenge to the sufficiency of the evidence to support the jury's verdict and the trial court's decision. The standard of review is essentially the same as when the trial court has granted the motion.

" 'In making the order granting the motion for judgment notwithstanding the verdict, the trial court may not weigh the evidence or judge the credibility of the witnesses, as it may do on a motion for a new trial, but must accept the evidence tending to support the verdict as true, unless on its face it should be inherently incredible. Such order may be granted only when, disregarding conflicting evidence and indulging in every legitimate inference which may be drawn from plaintiff's evidence, the result is no evidence sufficiently substantial to support the verdict. [¶] 'On an appeal from the judgment for defendant notwithstanding the verdict, the appellate court must read the record in the light most advantageous to the plaintiff, resolve all conflicts in his favor, and give him the benefit of all reasonable inferences in support of the original verdict. . . . ' " (*Borba v. Thomas* (1977) 70 Cal.App.3d 144, 151-152, quoting *Hale v. Farmers Ins. Exch.* (1974) 42 Cal.App.3d 681, 690, overruled on another grounds in *Egan v. Mutual of Omaha Ins. Co.*

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appealability and consolidation issues would have been raised if the trial court had not granted a new trial on the damages issue.

(1979) 24 Cal.3d 809, 822, fn. 5.) Accordingly, we determine whether there is substantial evidence to support the jury's conclusions and the trial court's decision, i.e., whether plaintiffs proved every element of their cause of action. (*Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, 743-744; *Sprigg v. Garcin* (1980) 105 Cal.App.3d 869, 873.)

Before reviewing the question of whether there was substantial evidence to support the jury's verdict and the trial court's decision, we consider the general principles of plaintiffs' cause of action for deprivation of its civil rights.

GENERAL PRINCIPLES OF CIVIL RIGHTS ACTIONS AND DUE PROCESS

The civil rights statute provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . " (42 U.S.C.A. § 1983.)

The essential elements of a cause of action are, therefore, (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. (*Parratt v. Taylor* (1981) 451 U.S. 527,

535, overruled on another ground in *Daniels v. Williams* (1986) 474 U.S. 327.)

The use of section 1983 in the land use context dates from *Monell v. Dept. of Soc. Serv. of City of N. Y.* (1978) 436 U.S. 658. In that case, the Supreme Court overruled an earlier case that had held that local governments were wholly immune from suit under section 1983. (*Id.*, at p. 663.) The court reviewed the legislative history and concluded that Congress intended to include municipal government units to be included among the persons to whom section 1983 applies. (*Id.*, at p. 690.) The court therefore held that local governing bodies can be sued for damages where the action alleged to be unconstitutional "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." (*Ibid.*) The decision also allowed suits for deprivations resulting from the custom of local governments, even if the custom had not been formally approved by the governing body. (*Id.*, at pp. 690-691.)

Subsequently, in *Owen v. City of Independence, Mo.* (1980) 445 U.S. 622, the Supreme Court reviewed a suit by a dismissed chief of police and held that the good faith of city officials did not give the municipality a qualified immunity from suit under section 1983. (*Id.*, at p. 638.) Thus the municipality itself had no immunity from damages flowing from its constitutional violations of the rights of individual citizens. (*Id.*, at p. 657.)

In *Parratt v. Taylor, supra,* 451 U.S. 527, the court held that, although prison officials there clearly acted under color of state law, the deprivation element was not satisfied because postdeprivation remedies under state law

were adequate to satisfy due process. Specifically, the tort claims procedure of the state provided such a remedy for the prisoner who had suffered a tortious loss of his property. (*Id.*, at p. 543.) Accordingly, there was no violation of the due process clause, and no violation of section 1983.

Similarly, in *Hudson v. Palmer* (1984) 468 U.S. 517, the court extended the principle to include cases in which deprivation resulted from intentional state actions which deprived a prisoner of his property.

The Supreme Court applied these principles in a land use case in which the developer sued under section 1983 and argued that the Planning Commission had taken his property without paying just compensation. The Supreme Court held the claim premature. (*Williamson Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172.) The court said that resolution of the due process issue "depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property. No such decision had been made at the time respondent filed its § 1983 action, because respondent failed to apply for variances from the regulations." (*Id.*, at p. 200.)

In addition, the Second Circuit has held that denial of a request for zoning relief does not involve denial of a protected property right. (*Yale Auto Parts, Inc. v. Johnson* (2d Cir. 1985) 758 F.2d 54.) The First Circuit has also

declined to find a due process violation in the ordinary type of dispute between a developer and a local planning agency. (*Creative Environments, Inc. v. Estabrook* (1st Cir. 1982) 680 F.2d 822, 833.)

Lower federal courts have also applied an abstention doctrine to refrain from turning local land use disputes into federal civil rights claims. (E.g., *C-Y Development Co. v. City of Redlands* (9th Cir. 1983) 703 F.2d 375.)

SUBSTANTIAL EVIDENCE ISSUES

The parties here stipulated that the officials here were acting under color of law, and that they acted intentionally. The first element of the cause of action was therefore satisfied. The issue thus becomes a question of whether Stubblefield was deprived of a federal constitutional right, i.e., the right to substantive due process and/or the right to equal protection of law.

The City argues that the trial court erred in failing to determine certain legal issues which relate to these questions.[10]

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[10] We do not reach the issues of the scope of the issues submitted to the jury, and whether the special verdict form was defective. We note, however, on the first question, that the federal authorities cited by plaintiffs are inapplicable because the Seventh Amendment right to trial by jury does not apply to the states. (See, generally, 1 Schwartz, Section 1983 Litigation (2d ed. 1991) § 16.2, p. 838.)

In addition, several of the issues presented are pure issues of law for the court's determination. Plaintiffs argued that the jury should decide the ultimate issue of whether the City's actions were irrational or arbitrary, but the issue was not submitted to the jury. However, the trial court instructed the jury

With regard to substantive due process, the City first argues that the trial court erred in failing to initially determine whether plaintiffs had a property right protected by the due process clause, i.e., whether plaintiffs had a vested right to develop their property. If the trial court had considered and made this determination, the City contends that it would have found that no property right existed, and that there was insufficient evidence to submit the issue to the jury.

Secondly, the City argues that there was no deprivation of substantive due process rights because Stubblefield failed to prove a substantive due process violation as a matter of law. The City contends that the trial court failed to determine that there was sufficient evidence of such a violation to submit the issue to the

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that it would determine whether Stubblefield's civil rights had been violated "based upon [the jury's] determination of these factual issues." The record does not disclose either the basis for the trial court's decision to decide the civil rights issue itself or the trial court's ultimate decision or reasoning in that regard.

On the second question, the form of the verdict, it appears that, although the trial court decided to ask the jury for a special verdict on only the six questions quoted above, it also instructed the jury to decide whether plaintiffs' constitutional rights were violated.

Plaintiffs filed written objections to the court's apparent decision to itself decide whether the City violated plaintiffs' civil rights. The argument on the objections is not in our record.

The narrowness of the questions actually decided by the jury undercut the usual deference to be given to the jury's factual findings. We give no deference to the jury's findings to the extent that the jury purported to decide purely legal issues, and the deference given on factual matters is limited to the narrow questions the jury actually answered.

jury, and there was insufficient evidence as a matter of law.

With regard to equal protection, the City argues that the evidence was insufficient to support a cause of action because there was a rational basis for the actions taken. Under this heading, the City analyzes 20 instances of alleged discriminatory treatment and finds that they were either nonactionable, rationally related to a legitimate state interest, and/or barred by the statute of limitations.

SUBSTANTIVE DUE PROCESS – VESTED RIGHTS

The City's first argument is that plaintiffs had no vested rights to develop their property. Although the proposed use was in accordance with the existing zoning of the property, the City argues that plaintiffs had no right to a particular zoning or to a building permit.

The City cites *Board of Regents v. Roth* (1972) 408 U.S. 564. In that case, the Supreme Court held that an untenured teacher at a state university had no constitutional right to a statement of reasons and a hearing on the university's decision not to hire him for another year. Speaking generally, the Court said: "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests – property interests – may take many forms. . . . [¶] Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or

understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Id.*, at pp. 576-577.) Accordingly, the teacher was held not to have "a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." (*Id.*, at p. 578.)

The City thus frames the issue as to whether plaintiffs had a right to build apartments on their property under state law. It argues that no such right arose under California law. It cites *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785. In that case, our Supreme Court considered whether a developer had vested rights under California law. The court said: "It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. [Citations.] Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied." (*Id.*, at p. 791.) After discussing vested rights at common law, the court found that applicable precedent "stand[s] for the proposition that neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued. By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to

a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued." (*Id.*, at p. 793.) The court also suggested that other permits, such as a conditional use permit, might create a vested right if they gave substantially the same specificity and definition to a project as a building permit.[11] (*Id.*, at pp. 793-794.)

We find *Avco* persuasive and thus conclude that Stubblefield had no vested right to build any particular apartment buildings because it had not applied for or received a building permit for its project.[12] We also agree that, under *Avco*, plaintiffs here had no vested right to develop their property in accordance with the zoning in existence at the time they submitted their review of plans application. (Cf. *Seguin v. City of Sterling Heights* (6th Cir. 1992)

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[11] The significance of a building permit is that it is approval of a specific structure which complies with the law in effect at the time the permit is issued. (*Avco Community Developers, Inc. v. South Coast Regional Com., supra*, 17 Cal.3d 785, 801.)

[12] *Avco* also rejects the argument, made here, that the developer was entitled to a building permit because the county would have had to issue one upon mere application. The Orange County Building Code codified "the general rule that a builder must comply with the laws which are in effect at the time a building permit is issued, including the laws which were enacted after application for the permit." (*Avco Community Developers, Inc. v. South Coast Regional Com., supra*, 17 Cal.3d 785, 795.) Here, the review of plans process was never completed and building permits were not applied for.

968 F.2d 584, 591; *Wedges/Ledges of California, Inc. v. City of Phoenix, Ariz.* (9th Cir. 1994) 24 F.3d 56, 62.)

SUBSTANTIVE DUE PROCESS – EVIDENCE OF VIOLATION

In response to the preceding argument, plaintiffs contend that they need not possess a vested right in order to argue their substantive due process claim because they have a due process right to be protected from arbitrary or irrational government actions, or legislative enactments which are not rationally and substantially related to a legitimate governmental interest.

The City contends that plaintiffs did not prove a substantive due process claim under any of the applicable authority.

For purposes of discussion in this section, we accept plaintiffs' premise and assume that plaintiffs did not have to have a vested right in order to assert substantive due process as a protection against irrational and arbitrary actions by the City.[13] "It is by now well established that

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[13] We note, however, that, in some of the cases cited by plaintiffs, a vested right exists by virtue of the ownership of the property itself. The deprivation of all or part of that ownership interest was the subject of a takings claim. (E.g., *Nollan v. California Coastal Commission* (1987) 483 U.S. 825.) While a takings claim was also made here, the case was not tried on that cause of action.

The City also cites *Zorzi v. County of Putnam* (7th Cir. 1994) 30 F.3d 885, 894-895: "A claim based on substantive due process must be based on the deprivation of an underlying protected life, liberty or property interest. [Citations.] 'Accordingly, the absence of any claim by the plaintiff that an interest in liberty or

legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." (*Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 15.) We therefore consider the sufficiency of the evidence of a substantive due process violation arising from arbitrary or irrational actions.[14]

The City relies on *PFZ Properties, Inc. v. Rodriguez* (1st Cir. 1991) 928 F.2d 28. In that case, the court considered rejection of a developer's construction permit. Under facts similar to those here, the court found no deprivation of procedural or substantive due process, or equal protection. In rejecting a substantive due process claim based on arbitrary action, the court said: "This Court has repeatedly held, however, that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. [Citations.] Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. [Citation.] The doctrine of substantive due process 'does

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property has been impaired is a fatal defect in her substantive due process argument.' [Citation.] [¶] . . . [I]n the absence of a life, liberty or property interest Zorzi could be terminated for arbitrary and capricious reasons."

[14] Again we note that neither the trial court nor the jury made a specific finding that the City had acted irrationally or arbitrarily in its actions towards Stubblefield. The judgment only recites that, based on the jury's special verdict, the court finds an unspecified federal civil rights violation.

not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of government power that shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." ' [Citations.] PFZ's allegations concerning [the agency's] treatment of its proposal simply do not make out a substantive due process violation under this standard." (*Id.*, at pp. 31-32; see, also, *Chiplin Enterprises v. City of Lebanon* (1st Cir. 1983) 712 F.2d 1524; *Creative Environments, Inc. v. Estabrook, supra,* 680 F.2d 822.)[15]

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[15] At oral argument, Stubblefield's counsel argued that the First Circuit cases represent a minority view, out of step with other circuit courts.

All circuits agree that a substantive due process claim can be stated in some circumstances involving controversies similar to this one. Discussions of the differences between circuits in this regard are found in *Pearson v. City of Grand Blanc* (6th Cir. 1992) 961 F.2d 1211, 1217-1223, and *Littlefield v. City of Afton* (8th Cir. 1986) 785 F.2d 596, 604-607. The latter case supports plaintiffs by stating that the First Circuit is the only circuit that generally refuses to recognize substantive due process claims under section 1983. (*Id.*, at p. 604.)

However, the arbitrary or irrational standard applied here, and/or the First Circuit cases cited above, have been followed by the Second Circuit in *RRI Realty Corp. v. Inc. Village of Southampton* (2d Cir. 1989) 870 F.2d 911, 915, and *Sullivan v. Town of Salem* (2d Cir. 1986) 805 F.2d 81, 82; the Third Circuit in *Pace Resources, Inc. v. Shrewsbury Tp.* (3d Cir. 1987) 808 F.2d 1023, 1036; the Fourth Circuit in *Scott v. Greenville County* (4th Cir. 1983) 716 F.2d 1409, 1419, and *Gardner v. Baltimore Mayor & City Council* (4th Cir. 1992) 969 F.2d 63, 68; the Fifth Circuit in *Shelton v. City of College Station* (5th Cir. 1986) 780 F.2d 475, 482; the Sixth

We agree with this characterization of substantive due process in the land use context. "[P]laintiff has failed to identify any federally protected right of which it was deprived when the Board denied its development application. [¶] . . . [F]ederal courts do not sit as a super zoning board or a zoning board of appeals." (*Arroyo Vista Partners v. County of Santa Barbara* (C.D. Cal. 1990) 732 F.Supp. 1046, 1051.)

More fundamentally, we agree with the City's contention that the facts proven here simply do not rise to the level of a substantive due process violation.

In our view, plaintiffs have not, as a matter of law, shown arbitrary or irrational government action. Rather, the record demonstrates actions of the City Council that responded to concerns of constituents in the affected area and other political concerns. Specifically, the alleged vendetta of Councilman Marks against the project has not been shown to be an arbitrary and irrational action as a matter of substantive due process. It is not uncommon or unusual for a legislator to oppose a project and to use all

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Circuit in *Pearson v. City of Grand Blanc, supra,* 961 F.2d 1211, 1217-1223; the Seventh Circuit in *Albery v. Reddig* (7th Cir. 1983) 718 F.2d 245, 249, 251, and *Curto v. City of Harper Woods* (6th Cir. 1992) 954 F.2d 1237; the Eighth Circuit in *Chesterfield Dev. v. City of Chesterfield* (8th Cir. 1992) 963 F.2d 1102, 1104, and *Littlefield v. City of Afton, supra,* 785 F.2d 596, 604-607; and the Ninth Circuit in *Southern Pacific v. City of Los Angeles* (9th Cir. 1990) 922 F.2d 498, 507.

See, also, *Rutherford v. State of California* (1987) 188 Cal.App.3d 1267, 1286-1288. For further discussion of differences between circuits in the section 1983 land use litigation context, see 1 Schwartz & Kirklin, Section 1983 Litigation (2d ed. 1991) section 3.14, pages 213-219.

means within his or her power to defeat it. After all, a legislator is supposed to respond to the concerns of his or her constituents, and there is ample evidence in the record here that persons living in the vicinity of the project were concerned about it. Whether their concerns were proper or justified is not the issue here. The point is that their elected representative decided to oppose the project, and did so vigorously. "The opinion of area residents concerning neighborhood preservation is an appropriate factor for consideration in zoning decisions." (*Nelson v. City of Selma* (9th Cir. 1989) 881 F.2d 836, 840.)

The actions of the City Council were also proper. A legislative body is generally not bound by the actions of its predecessors. Accordingly, it may amend zoning, general plan, and other provisions applicable to a property without incurring liability.[16] While arbitrary zoning actions directed at a specific property may be invalidated (*Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330), the actions taken here were general in nature. For example, the R-3 ordinance that was amended in October 1986, applied to all multi-family housing units in the City. The moratorium imposed as a result of the unrelated lawsuit affected all foothill properties and 40 or 50 proposed projects north of a certain line. The City's refusal to allow the project to be grandfathered resulted in the project being subject to the same rules as all other properties covered by the revised R-3 ordinance. In short, we find a rational basis for the City's actions. (*Greenbriar, Ltd. v. City of Alabaster, supra,* 881 F.2d 1570, 1577; *Arroyo*

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[16] As noted above, the inverse condemnation causes of action in *Stubblefield I* were not tried.

Vista Partners v. County of Santa Barbara, supra, 732 F.Supp. 1046, 1054.)

In *Jackson Court Condominiums v. City of New Orleans* (5th Cir. 1989) 874 F.2d 1070, 1077, the court said: " 'We hold that the outside limit upon a state's exercise of its police power and zoning decisions is that they must have a rational basis.' [Citation.] The key to such an inquiry is whether the question is 'at least debatable.' [Citation.] Those challenging a legislative decision 'must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " Accordingly, the court upheld an interim moratorium on time share developments in residential areas because the question was one of legitimate and debatable concern.

More generally, we agree with *Creative Environments, Inc. v. Estabrook, supra,* 680 F.2d 822: "Plaintiffs would thus have us rule that the due process clause to the United States Constitution was violated when Bolton's Planning Board, for the purpose of protecting what it viewed as the town's basic character, openly interpreted state subdivision laws and a state court decision in ways which frustrated plaintiffs' large-scale housing development of a particular design. [¶] Such a claim is too typical of the run of the mill dispute between a developer and a town planning agency, regardless of CEI's characterizations of it and of defendants' alleged mental states, to rise to the level of a due process violation. The authority cited by CEI, as well as other cases, all suggest that the conventional planning dispute – at least when not tainted with fundamental procedural irregularity, racial animus, or the like – which takes place within the framework of an

admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution. This would be true even were planning officials to clearly violate, much less 'distort' the state scheme under which they operate. . . . It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983. As has been often stated, '[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution.' [Citations.] In short, we see nothing in the present case to distinguish it sufficiently from the usual land developer's claim under state law to warrant recognition of a federal constitutional question. CEI may quite possibly have state law claims on the facts alleged. If so, there appear to be adequate state law remedies to vindicate these claims without resort to a federal court." (*Id.*, at pp. 832-833, fns. omitted.)

In this case, the state law remedies are also adequate. We are reluctant to minutely scrutinize the legislative processes of the City in the manner proposed by plaintiffs. It is sufficient that those processes are rational, and not arbitrary or irrational. "If we find that the rational relation of the zoning actions to legitimate governmental interests is at least fairly debatable, the action must be upheld." (*Nelson v. City of Selma, supra,* 881 F.2d 836, 839.)

We so find. This is an ordinary dispute between a developer and a municipality and we conclude that the claims asserted simply do not qualify as deprivations of substantive due process. (*Greenbriar, Ltd. v. City of Alabaster, supra,* 881 F.2d 1570, 1579-1580; *Kawaoka v. City of Arroyo Grande* (9th Cir. 1994) 17 F.3d 1227, 1234, 1238.)

EQUAL PROTECTION – RATIONAL BASIS

The City relies on the general principle stated in *Kadrmas v. Dickinson Public Schools* (1988) 487 U.S. 450, 457-458: "Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate government purpose." Under this test, a statute will be upheld if it bears a rational relation to a legitimate government objective. Specifically, the court said: "Social and economic legislation like the statute at issue in this case, moreover, 'carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.' [Citations.] '[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.' [Citation.] In performing this analysis, we are not bound by explanations of the statute's rationality that may be offered by litigants or other courts. Rather, those challenging the legislative judgment must convince us 'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' [Citation.]" (*Id.*, at pp. 462-463.)

In the land use context, the City cites *Greene v. Town of Blooming Grove* (2d Cir. 1989) 879 F.2d 1061. In that case a zoning classification was challenged under section 1983. In rejecting an equal protection argument, the court held

that the zoning district was rationally related to legitimate state interests. The court said: "Generally a municipal zoning ordinance is presumed [to] be valid [citation], and will not be held unconstitutional if its wisdom is at least fairly debatable and it bears a rational relationship to a permissible state objective." (*Id.*, at p. 1063.)

In our view, there was nothing arbitrary or unreasonable in the zoning actions taken here. The revised R-3 multi-family zoning ordinance applied to all multi-family housing in the City. The urgency ordinance applied to all development applications pending at the time it was adopted. The moratorium ordinance applied to all foothill property north of a specified line. The general plan revisions affected all property in the City, while the hillside provisions were based on the slope percentages. These were all rational classifications.[17]

Plaintiffs argued that their property was unique and failed to show that they were treated differently from other landowners similarly situated. (*Madarang v. Bermudes* (9th Cir. 1989) 889 F.2d 251, 253; *Craft v. Wipf* (8th Cir. 1987) 836 F.2d 412, 418; *Yale Auto Parts, Inc. v. Johnson, supra,* 758 F.2d 54, 61.) "In order to prevail, the [plaintiff] must make a showing that a class that is similarly situated has been treated disparately." (*Christian Gospel Church v. San Francisco* (9th Cir. 1990) 896 F.2d 1221, 1225.)

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[17] Nothing in this opinion determines the issues as to the validity of the General Plan amendments which imposed the limitations on hillside construction. These issues, including inverse condemnation issues, are still pending in *Stubblefield II.*

The City also cites *Trafford v. Penno* (D.R.I. 1992) 800 F.Supp. 1052, 1057: "Proving an actual deprivation of equal protection rights in a dispute between a developer and a town planning agency is a daunting task. First, Plaintiff must prove that he was actually treated differently than other developers similarly situated. Absent proof of differing treatment, an equal protection claim must fail."

As noted above, plaintiffs asserted some 13 instances of allegedly discriminatory treatment. Having reviewed the cited instances, we find them insufficient to support a denial of equal protection claim.[18] While it may fairly be said that certain actions of the City Council, specifically including certain actions of Councilman Marks, were taken with the Stubblefield project in mind, and were taken for the purpose of blocking the project, the motive of the legislators is generally irrelevant.[19] (*Hancock Industries v. Schaeffer* (3d Cir. 1987)

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[18] In the original complaint, plaintiffs alleged, as the basis for their equal protection claim, that the City's actions were based on discrimination "based on socio-economic status and on the basis of racial or ethnic origins of the prospective tenants." These allegations were not proven at trial. The application defined the project as an upscale multi-family community. Mr. Stubblefield testified that the project would be a high rent apartment project but, because of requirements of project financing, 20 percent of the apartments would be set aside for low and moderate income families.

[19] Without adopting the City's reasoning on the specific instances cited by plaintiff, we note that a number of the actions were initiated or taken by Councilman Marks in his efforts to oppose the project. We find nothing arbitrary or irrational in Councilman Mark's opposition to the project. Thus the facts that the City Council had a meeting on the project at Sturgis Auditorium, or that Councilman Marks mailed out letters to his

811 F.2d 225, 237.) As *Hancock* states: "If the legislative determination that its action will tend to serve a legitimate public purpose 'is at least debatable,' the challenge to that action must fail as a matter of law." (*Id.*, at p. 238.)

Thus, even if, as the jury found, the actions of the City were motivated by the purpose of intending to discriminate against Stubblefield, an equal protection claim has not been shown. "When there is insufficient evidence of racial discrimination, we review the City's actions to determine whether [plaintiffs'] property has been treated differently from similarly situated property and whether there is any rational basis for such treatment. [Citation.] [¶] [plaintiffs'] equal protection claim must fail because there is no evidence in the record that property similar to the [plaintiffs] was treated differently. Unfortunately for the [plaintiffs], it may be impossible to provide this evidence, as the [plaintiffs'] land . . . [is] in fact unique. . . . [¶] In the end, even if the [plaintiffs] were singled out for different treatment, the City has provided a rational explanation for why the general plan treats the [plaintiffs'] property as it does." (*Kawaoka v. City of Arroyo Grande, supra,* 17 F.3d 1227, 1240.)

None of the actions taken by the City Council, on their face, applied to this project alone. The regulation of foothill property, including the apartment projects proposed here, is clearly a legitimate public purpose. This is

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constituents opposing the project are constitutionally insignificant, even if the City Council had not previously held such a meeting, and even if Councilman Marks had never sent out letters opposing any other project. Such activities merely represent the democratic process at work.

particularly true in this case, since the environmental questions raised by opponents of the project have never been answered. Zoning regulation of multi-family apartment units is unquestionably a legitimate public purpose. The classifications adopted by the City Council were clearly related to that purpose and we find no substantial basis for plaintiffs' equal protection challenge.

OTHER APPEALS AND ISSUES

In view of our decision that the City's motion for judgment notwithstanding the verdict should have been granted, we need not discuss the other issues. Since plaintiffs are not the prevailing parties, the order granting interim attorney fees to plaintiffs must also be reversed.

DISPOSITION

The judgment is reversed. The order dated June 10, 1991, denying the City's motion for judgment notwithstanding the verdict is reversed. The order granting interim attorney fees to plaintiffs, filed August 19, 1991, is reversed.

Plaintiffs' notice of appeal filed July 9, 1991, and Plaintiffs' notice of cross-appeal dated July 29, 1991, are dismissed as moot.

Each party is to bear its own costs on appeal.

CERTIFIED FOR PUBLICATION

/s/ HOLLENHORST
J.

We concur:

/s/ DABNEY
Acting P.J.

/s/ RICHLI
J.

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

STUBBLEFIELD CONSTRUCTION CO., et al., Plaintiffs and Appellants, v. CITY OF SAN BERNARDINO, Defendant and Respondent. [AND RELATED CROSS-APPEALS]	E009749 (consol. with E010088) (Super.Ct.Nos. 242998 and 252058) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING AND CERTIFYING OPINION FOR PUBLICATION (Filed Feb. 23, 1995)

The opinion filed in this case on January 27, 1995, is modified as follows:

On page 3, footnote 1, the following citation should read as follows:

" . . . Sinaloa Lake Owners Ass'n v. City of Simi Valley (9th Cir. 1989) 882 F.2d 1398, 1407-1409, cert. den. 494 U.S. 1016. . . . "

On page 26, the following citation should read as follows: "*PFZ Properties. Inc. v. Rodriguez* (1st Cir. 1991) 928 F.2d 28, cert. granted, 112 S.Ct. 41, cert. dismissed, 112 S.Ct. 1151."

A request having been made to this Court pursuant to rule 978 of the California Rules of Court for publication of the nonpublished opinion heretofore filed in the above-entitled matter and it appearing that the opinion meets the standard for publication as specified in rule 976 of the Rules of Court,

IT IS ORDERED that said opinion be certified for publication pursuant to rule 976.

Except for these modifications, the opinion previously filed remains unchanged.

The petition for rehearing is denied.

HOLLENHORST
J.

We concur:

DABNEY
Acting P.J.

RICHLI
J.

Fourth Appellate District, Division Two, No. E009749
S045308

IN THE SUPREME COURT OF CALIFORNIA

STUBBLEFIELD CONSTRUCTION CO. Et Al., Appellants

v.

CITY OF SAN BERNARDINO, Respondent

And Companion Cases

(Filed Apr. 20, 1995)

Appellants' petition for review DENIED.

Arabian, J. is of the opinion the petition should be granted.

Lucas
Chief Justice

HILL, FARRER & BURRILL
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

STUBBLEFIELD CONSTRUCTION COMPANY, etc., et al., Petitioners and Plaintiffs, vs. CITY OF SAN BERNARDINO, et al., Respondents and Defendants.	CASE NO. 24 29 98 JUDGMENT ON SPECIAL VERDICTS FOR PLAINTIFFS (Filed Apr. 10, 1991)

This action came on regularly for trial by jury on January 30, 1991, with plaintiffs Stubblefield Construction Company and Stubblefield Properties appearing by their attorneys Hill, Farrer & Burrill and Darlene Fischer Phillips, and defendants City of San Bernardino, Common Council of the City of San Bernardino, Evlyn Wilcox, Mayor, Esther Estrada, Jack Reilly, Jess Flores, Michael Maudsley, Tom Minor, Valerie Pope Ludlam, and Norine Miller, as members of the Common Council, Planning

Commission of the City of San Bernardino, and Steve Marks appearing by their attorneys James F. Penman, City Attorney, and Henry Empeno, Jr., Deputy City Attorney; a jury of twelve persons was duly impaneled and sworn; witnesses testified; on March 5, 1991, the court, on the motion of plaintiffs, ordered the dismissal of defendants Common Council of the City of San Bernardino, Evlyn Wilcox, Mayor, Esther Estrada, Jack Reilly, Jess Flores, Michael Maudsley, Tom Minor, Valerie Pope Ludlam, and Norine Miller, as members of the Common Council, and Planning Commission of the City of San Bernardino; further on March 5, 1991, the court granted the defendants' Motion for Non-Suit as to Steve Marks only; further witnesses testified; and after being duly instructed by the court, the jury deliberated and thereon duly returned the following special verdicts:

PART I: STUBBLEFIELD'S CLAIM AGAINST DEFENDANT CITY OF SAN BERNARDINO REGARDING DENIAL OF SUBSTANTIVE DUE PROCESS IN VIOLATION OF 42 U.S.C. SECTION 1983

1. Were all of the City's actions regarding the Stubblefield's apartment project performed for a purpose which was substantially related to the public health, safety, morals or general welfare?

YES _ NO X

If you answered "YES" to Question 1, please go to Part II. If you answered "NO" to Question 1, please answer the next question.

2. Was Stubblefield damaged as a result of any of the City's actions regarding the Stubblefield's apartment project?

YES X NO _

If you answered "YES" to Question 2, please answer the next question. If you answered "NO" to Question 2, please go to Part II.

3. What was the total amount of Stubblefield's damages which were caused by the City's actions?

ANSWER $11,537,000

PART II: STUBBLEFIELD'S CLAIM AGAINST DEFENDANT CITY OF SAN BERNARDINO REGARDING DENIAL OF EQUAL PROTECTION IN VIOLATION OF 42 U.S.C. SECTION 1983

1. Were the City's actions regarding the Stubblefield's apartment project motivated with a purpose of intending to discriminate against Stubblefield?

YES X NO _

If you answered "YES" to Question 1, please answer the next question. If you answered "NO" to Question 1, please date and sign this Special Verdict Form.

2. Were the City's actions regarding the Stubblefield's apartment project substantially related to a legitimate governmental interest?

YES _ NO X

If you answered "YES" to Question 2, please date and sign this Special Verdict Form. If you answered "NO" to Question 2, please answer the next question.

3. Was Stubblefield damaged as a result of the City's actions regarding the Stubblefield's apartment project?

YES X NO _

If you answered "YES" to Question 3, please answer the next question. If you answered "NO" to Question 3, please date and sign this Special Verdict Form.

4. What was the total amount of Stubblefield's damages which were caused by the City's actions?

ANSWER $11,537,000

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED, based on the foregoing Special Verdicts, that defendant City of San Bernardino has violated the federal civil rights of plaintiffs Stubblefield Construction Company and Stubblefield Properties and that plaintiffs shall recover from defendant City of San Bernardino the sum of $11,537,000.00 in damages together with interest thereon at the legal rate from the date of the verdict until paid, together with costs and disbursements in the amount of $___.

DATED: 4-10-91

/s/ Don A. Turner
DON A. TURNER
Judge of the Superior Court

EXCERPTS FROM REPORTERS' TRANSCRIPT ON APPEAL

TESTIMONY OF FRANK ARNOLD SCHUMA, FORMER PLANNING DIRECTOR OF THE CITY OF SAN BERNARDINO, CALLED AS AN ADVERSE WITNESS UNDER CALIFORNIA EVIDENCE CODE § 776 AND SWORN, FEBRUARY 6, 1991

Reporters' Transcript On Appeal at 1171-72

Q WHEN YOU WERE PLANNING DIRECTOR FOR THE CITY OF SAN BERNARDINO, WHAT WAS THE FUNCTION OF THE DEVELOPMENT REVIEW COMMITTEE?

A THE COMMITTEE WAS PRIMARILY RESPONSIBLE FOR REVIEWING AND APPROVING APPLICATIONS THAT COMPLIED WITH THE VARIOUS ORDINANCES OF THE CITY.

IT WAS REFERRED TO AS REVIEW OF PLANS PROCESS.

REVIEW OF PLANS WAS THE NAME OF THE APPLICATION.

AND WHEN A PROJECT CONFORMED TO ALL OF THE ZONING REQUIREMENTS OF THE CITY, THAT MEANT THAT THE PROJECT CONFORMED TO THE ZONING CLASSIFICATION.

IT CONFORMED TO ALL THE BUILDING SETBACKS, THE HEIGHT OF THE BUILDINGS, THE PARKING REQUIREMENTS, LANDSCAPING REQUIREMENTS, TRASH ENCLOSURES.

EVERYTHING COMPLIED WITH THE STANDARDS THAT WERE ESTABLISHED BY THE CITY.

THEN WE REVIEWED THEM. AND ON A PERIODIC BASIS, APPROVED THOSE TYPES OF APPLICATIONS ADMINISTRATIVELY.

THERE WAS NO DISCRETIONARY FUNCTION IN THAT RULE.

IT WAS JUST A STRAIGHT CUT AND DRY REVIEW AND APPROVE.

Reporters' Transcript on Appeal at 1185-86

Q NOW, IF A DEVELOPMENT PROJECT, A REVIEW OF PLANS PROJECT THAT WAS SUBMITTED TO YOUR DEPARTMENT MET ALL OF THESE FINDINGS, WAS THAT PROJECT APPROVED?

A YES.

Q ARE YOU GENERALLY FAMILIAR WITH THE TERMS MINISTERIAL AND DISCRETIONARY AS THEY APPLIED TO PLANNING PROCEDURES?

A GENERALLY.

Q WOULD YOU PLEASE EXPLAIN THE DIFFERENCES BETWEEN THOSE TWO THINGS?

A A MINISTERIAL ACT IS THAT PROCESS WHICH IS – ISSUES SUCH AS THE REVIEW OF PLANS WHERE THERE'S NO DISCRETIONARY AUTHORITY BEING GIVEN TO THIS – THE STAFF.

IN THIS CASE, THERE'S NO INTERJECTION OF THOUGHT RELATIVE TO THE APPROVAL OR DENIAL OF THE PROJECT.

IT MEETS THE STANDARDS, THEREFORE IT HAS TO BE APPROVED.

Q AND THAT'S MINISTERIAL?

A THAT'S A MINISTERIAL PROJECT.

Q WHAT IS DISCRETIONARY?

A DISCRETIONARY IS – ARE THOSE PROJECTS THAT HAVE TO GO BEFORE THE PLANNING COMMISSION AND/OR THE CITY COUNCIL WHERE THE COMMISSION AND THE CITY COUNCIL HAVE SOME DEGREE OF LATITUDE TO GO BACK AND MAKE CHANGES ON THE PROJECT.

THEY CAN ADD CERTAIN CONDITIONS. THEY CAN MAKE MODIFICATIONS TO THE PLANS THEMSELVES.

AND THEY ARE GIVEN – THEY ARE GIVEN A LOT MORE DISCRETION TO COME UP WITH THE PROJECT THAT WOULD BE MORE COMPATIBLE AND CONSISTENT IN THEIR OPINION WITH THE SURROUNDING AREA.

Q SO THE TERM DISCRETIONARY COMES FROM THE FACT THAT THEY HAVE MORE DISCRETION TO DENY A PROJECT?

A WELL, THE MINISTERIAL PROCESS, WE DID NOT HAVE THE ABILITY TO REALLY DENY A PROJECT, WHEREAS IN THE DISCRETIONARY PROJECTS, YOU DID HAVE THAT RIGHT TO DENY.

Q AND A REVIEW OF PLANS WAS WHICH TYPE OF ACTION?

A THAT WAS MINISTERIAL.

Reporters' Transcript On Appeal at 1252-53

IN MAY OF 1986, HOW DID THE CITY DETERMINE WHAT REGULATIONS WOULD GOVERN THE PROCESSING OF A REVIEW OF PLANS APPLICATION?

A THOSE REGULATIONS THAT WERE IN EFFECT AT THE TIME THAT THE PROJECT WAS SUBMITTED.

Q HOW LONG HAD THAT BEEN A POLICY OF THE CITY OF SAN BERNARDINO?

A I WAS FIRST EMPLOYED WITH THE CITY IN JANUARY OF 1981, AND TO MY RECOLLECTION IT WAS EVEN PRIOR TO MY EMPLOYMENT.

Q I'M SORRY. I DIDN'T HEAR THE LAST PART OF YOUR RESPONSE.

A IT WAS EVEN PRIOR TO MY EMPLOYMENT IN JANUARY OF 1981, TO THE BEST OF MY KNOWLEDGE.

Q WHEN YOU WENT TO WORK FOR THE CITY IN 1981, HOW DID YOU LEARN OF THAT POLICY?

A PRIMARILY THROUGH THE STAFF.

Q IN THE PLANNING DEPARTMENT?

A YES.

Q AND DURING YOUR TENURE AS PLANNING DIRECTOR, WAS THAT POLICY CONSISTENTLY APPLIED?

A YES.

Q UP TO THE FALL OF 1986, WERE YOU AWARE OF ANY EXCEPTION TO THAT POLICY?

A NO.

Q FROM THE TIME THAT THE REVIEW OF PLANS 86-51 WAS FILED, UP THROUGH THE FALL OF 1986, DID YOU TELL THE STUBBLEFIELDS THAT THEIR APPLICATION FOR THE REVIEW OF PLANS WOULD BE PROCESSED UNDER THE RULES AND REGULATIONS THAT WERE IN EFFECT WHEN THEY FILED IT?

A YES.

Q DID YOU TELL THEM THAT ON MORE THAN ONE OCCASION?

A YES.

Q IS IT FAIR TO SAY THAT YOU GAVE THEM ASSURANCES OF THAT?

A YES.

Reporters' Transcript On Appeal at 1280-81

Q NOW, THE STUBBLEFIELDS WERE NOT REQUIRED TO DO AN ENVIRONMENTAL IMPACT REPORT THOUGH UNDER THE REVIEW OF PLANS PROCESS; RIGHT?

A NO.

Q THAT'S YES, THEY WEREN'T?

A YES. THEY WERE NOT REQUIRED.

Reporters' Transcript On Appeal at 1294-95

Q MR. SCHUMA, JUST ONE FINAL QUESTION.

I DON'T BELIEVE I ASKED THIS THIS MORNING WHEN WE WERE TALKING ABOUT THE REVIEW OF PLANS PROCESS AND THE STUBBLEFIELD APPLICATION.

DID STUBBLEFIELD MEET ALL OF THE REQUIREMENTS OF THAT REVIEW OF PLANS PROCESS?

A YES.